STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED January 15, 2004
v	No. 241438 Wayne Circuit Court
SAMUEL DEJESUS, Defendant-Appellant.	LC No. 01-001632-01

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

Defendant, Samuel DeJesus, appeals as of right his conviction by a jury of second-degree murder, MCL 750.317 and felony firearm, MCL 750.227b. He was sentenced to consecutive prison terms of 2 years for felony firearm and 30-45 years for second-degree murder. We affirm.

I. FACTS

This case stems from defendant's theft of a Jeep Cherokee. Lenna Moreno testified that on October 5, 2000, she drove her Jeep Cherokee to a bar. She left it in the parking lot and when she returned a few minutes later, the Cherokee was gone. Defendant's brother, Jesus DeJesus ("Jesus"), testified that he drove defendant and a group of friends to the bar parking lot, where defendant stole the Cherokee.

The next day, Aaron Osborne and the victim, Victor Lazada (Moreno's boyfriend), were driving near Toledo and Junction Streets in Detroit when they spotted what they believed to be the victim's girlfriend's Cherokee. Osborne was driving and the victim instructed him to pull-up next to the Cherokee. Osborne testified that he could see three males through the tinted windows of the Cherokee. The victim rolled down his window and said, "That's my vehicle. Pull over." The Cherokee accelerated and Osborne followed. From the open driver's window, defendant pointed a pistol and fired twice at Osborne and the victim. One shot hit Osborne's car tire, the other shot went through the windshield and struck the victim in the head. The Cherokee sped away from the scene. Osborne drove the victim to the hospital, where the victim eventually died from the gunshot wound on October 15, 2000.

Lewis Perez, a friend of defendant and of the victim's brother, testified that on October 6, 2000, the victim's brother called and told him about the shooting. A few minutes later, defendant arrived at Perez's house and defendant said that he, "busted some niggers at Michigan

and Junction." Perez testified that he told defendant that he had shot Perez's friend's brother. Defendant showed Perez a gun and threatened to kill Perez if he "snitched."

The next day, defendant, Perez and a group of friends took the Cherokee to a park. They doused it in gasoline and set the Cherokee on fire. On October 12, 2000, Perez went to the police and showed them the burned Cherokee. The prosecutor agreed not to prosecute Perez for his role in crimes connected with the victim's shooting, in return for Perez's testimony against defendant.

At trial, Jesus testified about a conversation that he had with defendant after defendant found out the victim died. In response to questions from the prosecutor, Jesus stated that defendant had refused to answer him when he asked whether defendant had killed the victim. He further testified that defendant had not been crying during this conversation, but was depressed. He admitted that he had told the police that defendant was crying. In her closing argument, the prosecutor stated:

> Now, what's also interesting from the defendant's older brother, who may or may not have been totally forthright in his testimony. Maybe he didn't answer all the questions that were being asked. But what he did tell us is that Lewis [Perez] told him about the shooting. And when Jesus asked the defendant about the shooting the defendant wouldn't say nothing. Wouldn't say nothing. Confronted with the fact that you're being blamed for murder, the defendant doesn't say anything. But what does he do? He's depressed and he's crying.
>
> Now, ladies and gentlemen, common sense tells you that if you didn't commit the crime, if you weren't the shooter, why wouldn't you say to your own brother when asked did you do the shooting up at Michigan and Junction? Why wouldn't you say, "I didn't shoot anybody. I didn't commit any murder." Why would you just not say anything and begin crying? That's consciousness of guilt. Common sense.

The trial court instructed the jury on second degree murder and felony firearm. The jury found defendant guilty of both charges. This appeal ensued.

II. EFFECTIVE ASSISTANCE OF COUNSEL[1]

Defendant argues that he was denied effective assistance of counsel because trial counsel failed to object to questions asked and comments made by the prosecutor regarding defendant's reaction when defendant's brother questioned him about the murder. We disagree.

A. Standard of Review

[1] Defendant's brief contains an additional sentencing issue, however, defendant withdrew this issue on May 1, 2003 after declining the remand ordered by this Court on April 22, 2003.

Defendant did not raise the issue of ineffective assistance of counsel at trial, however, this court may review unpreserved claims of ineffective assistance of counsel but is limited to a review of the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

B. Analysis

The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Here, defendant has failed to persuade us that counsel committed any error by failing to object to the prosecutor's questions and statements regarding defendant's conversation with Jesus. Defendant relies on *People v Bigge*, 288 Mich 417; 285 NW 5 (1939), for the proposition that a defendant's tacit admission may not be used as substantive evidence of guilt. In *Bigge*, two individuals were having a conversation in the presence of the defendant, during which one stated the defendant was guilty of embezzlement. *Id.* at 419. The defendant remained silent, and did not profess his innocence. The prosecutor remarked that the defendant had a duty to profess his innocence at that time. *Id.* Our Supreme Court stated, "[t]he time has not yet come when an accused must cock his ear to hear every damaging allegation against him and, if not denied by him, have the statement and his silence accepted as evidence of guilt." *Id.* at 420. The Court also ruled that "[t]here can be no such thing as confession of guilt by silence in or out of court."

Our Supreme Court recently reviewed the application of the *Bigge* decision, in *People v Hackett*, 460 Mich 202; 596 NW2d 107 (1999). In *Hackett*, the defendant was implicated in a drug offense, yet there was no specific accusation or words spoken in his presence to which the defendant remained silent. Rather, the prosecutor elicited testimony from the defendant at trial that he had never confronted an individual whom the defendant contended had "set him up," even though the two were incarcerated together following the defendant's arrest. *Id.* at 208-209. The *Hackett* Court ruled:

> We conclude that *Bigge* is inapplicable to the resolution of this case. The silence referenced by the prosecution did not occur in the face of an accusation. There is simply no statement that defendant's silence can be construed as tacitly adopting. Thus, the rule of *Bigge* is not violated by the admission of the evidence. [215]

Here, like in *Hackett*, there was no accusation of guilt nor a "statement" made by defendant's brother as in *Bigge*; Jesus merely questioned whether defendant killed the victim. The language in *Hackett* makes our case distinguishable from *Bigge* and we find no error; thus,

because counsel is not required to advocate a meritless position, we find no ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Even if we were to find that the questioning of Jesus was improper, it could very well be a matter of sound trial strategy not to object. If defense counsel would have objected when the prosecutor first asked the brother about his recollection of any conversation with defendant after the crime, and if the objection was sustained, the jury would have been left with the damaging impression that defendant made an incriminating statement to his brother that they could not hear because of some legal technicality. This is opposed to the jury hearing the testimony that defendant did not say anything. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defendant does not overcome the presumption that counsel's inaction was a matter of sound trial strategy.

Lastly, even assuming counsel should have objected, there is no reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Even without the testimony of Jesus or the comments of the prosecutor, the testimony of Perez and Osborne, as well as police officers, provided evidence from which a jury could have found defendant guilty.

Affirmed.

/s/ Bill Schuette
/s/ William B. Murphy